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No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1961

HOWARD R. MARSHALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. 13–16) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1961. The petition for a writ of certiorari was filed on August 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was unlawfully entrapped.
2. Whether the dextro-amphetamine sulfate tablets involved were shown to have come within the proscription of 21 U.S.C. 353(b)(1)(B).

STATUTE INVOLVED

United States Code, Title 21, Section 353(b) provides:

> (1) A drug intended for use by man which
>
> * * * * * *
>
> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug * * *.
>
> * * * shall be dispensed only (i) upon a written prescription of a practioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.
>
> * * * * * *

STATEMENT

In April 1960, in the District Court for the District of Colorado, petitioner was convicted by a jury on two counts charging that he unlawfully dispensed the drug "dextro-amphetamine sulfate" without a prescription, in violation of 21 U.S.C. 353(b)(1)(B).[1]

[1] Petitioner was previously convicted for this same crime but the conviction was reversed because of extraneous events occurring during the course of the trial. 360 U.S. 310.

He was sentenced to imprisonment for one year on each count, the sentences to run concurrently.

The evidence may be summarized as follows: Robert Keating, a United States Food and Drug inspector, testified that he was introduced to the petitioner by one Robert Anderson, a mutual acquaintance, in Denver, Colorado, in April 1956 (Tr. 16). Keating posed as a salesman who was often forced to make long trips unexpectedly. On April 23, 1956, Keating met the petitioner again and told him that he had received a call from his "boss" in Dallas, Texas, to be in that city the following day; that he was unable to obtain airline reservations; and that he would have to drive during the night (Tr. 17–18). Keating asked if the petitioner could provide him with some "stay awake" pills called "benzadrine". Petitioner suggested that Keating take "No-Doz" tablets and drink plenty of coffee instead (Tr. 18). Keating said that these methods did not work with him. The petitioner and his wife then discussed with Keating a route to Dallas from Denver (Tr. 18). Keating then proceeded to leave the building. When he reached the sidewalk, the petitioner called and came towards Keating, handing him some tablets. Petitioner gave Keating directions to take half a tablet when he was getting sleepy and in about another four hours, if he was not alert and sharp, to take another half (Tr. 19). The tablets were later determined to be dextro-amphetamine sulfate tablets (Tr. 49).

Keating offered to pay for the tablets but the petitioner stated he could not "sell" them because he was not a doctor and because he was part owner of a

drug store. However, he said he did not know of any law which prevented him from giving the tablets away or which prevented Keating from putting a couple of dollars in an envelope when he reached Dallas and mailing it to the petitioner (Tr. 19). A few days later, Keating did send the petitioner $2.00 through the mails (Tr. 21).

On May 1, 1956, Keating once again visited the petitioner at his home about 7:30 p.m. The petitioner thanked Keating for the $2.00 "donation". Keating's purported trip to Dallas and the effect of the pills were discussed. Keating mentioned that he and his boss were enroute to Los Angeles and asked if 100 similar tablets could be obtained (Tr. 22–23). Petitioner requested that Keating return that evening or the next day but not to bring his boss to the house (Tr. 23). Later than evening Keating returned. The petitioner and another left the room, returning fifteen minutes later. Both Keating and the petitioner went outside the petitioner's apartment into a hallway where Keating was handed two small bottles, one containing dextro-amphetamine sulfate tablets and the other containing sleeping capsules (Tr. 23–24). Keating agreed to pay $15.00 for the tablets. Keating also discussed making trips to Oklahoma and Arkansas and the petitioner stated (Tr. 24):

> If you get there and find you need some more, you can write to me and tell me that you want me to send you the shoe buttons and button hooks that you left with me. I will know what you are talking about.

In neither the first transaction nor the second did the petitioner ask for a prescription and at no time did Keating furnish him with one (Tr. 25).

On cross-examination, Keating described the petitioner at the time of the first meeting, in April 1956, as "staggering"; that his speech was "slurred or thick-tongued"; that his eyes were "red and glassy" (Tr. 86–87). Keating also testified that on the evening of the first transaction, April 23, 1956, the petitioner exhibited similar but somewhat less severe characteristics (Tr. 90). He further stated that petitioner, on May 1, 1956, the night of the second transaction, was once again "wobbling in his walk" and "thick-tongued" in speech (Tr. 96).

ARGUMENT

1. Petitioner does not contest that he, in fact, dispensed the tablets to Keating without a prescription. He alleges, however, that he was induced to do so by government agents and was therefore unlawfully entrapped, as a matter of law. The testimony of the Food and Drug Inspector, Keating, shows that he used no undue pressure or inducement in requesting the tablets from the petitioner, who dispensed them of his own volition. The issue of entrapment was therefore properly submitted to the jury for its resolution. *Sorrells* v. *United States,* 287 U.S. 435, 441–442; *Sherman* v. *United States,* 356 U.S. 369, 372; *Masciale* v. *United States,* 356 U.S. 386, 388.

Petitioner argues that, at both times he dispensed the tablets without a prescription, he was in such a phys-

ical state that he "lacked the capacity to resist" the government agent's overtures (Pet. 9). However, there is no evidence of either the nature or the effect of petitioner's condition. Moreover, the physical state of the petitioner was not caused by the government or anyone who can be termed its agent. As the court below held, the physical state of petitioner was merely "a single circumstance proper to consider in the course of events leading to the sale of the contraband drug".

2. Petitioner asserts that the government failed to show that the dextro-amphetamine sulfate tablets came within the proscription of 21 U.S.C. 353(b)(1)(B). The sole test to determine whether a drug falls within the purview of that section is whether "because of its toxicity or other potentiality for harmful effect" it is "not safe for use except under the supervision of a practitioner licensed by law to administer such drug". The expert testimony presented by the government showed that dextro-amphetamine sulfate tablets are in this category.

Petitioner claims that the expert testimony showing that the tablets were dangerous, and thus within 21 U.S.C. 353(b)(1)(B), could not be applied retroactively to the date of the transactions, but was restricted to the date the testimony was given. The contention is without merit. Both medical experts testified as to the harmful effects of uncontrolled use of dextro-amphetamine sulfate tablets (Tr. 73–82, 102–108) and both concluded that it should not be dispensed without a prescription (Tr. 82, 108). In fact, Dr. Clyde Stanfield testified that the drug had been available only through prescription by a doctor for

some "10 or 14" years.[2] The petitioner himself recognized both the harmful effects of the drug (Tr. 99) and the fact that such a drug could not be dispensed except under a prescription (Tr. 19, 24).

Other convictions under this statute for dispensing amphetamine tablets without a prescription have been upheld. See *DeFreese* v. *United States*, 270 F. 2d 730 (C.A. 5), certiorari denied, 362 U.S. 944; *Roth* v. *United States*, 270 F. 2d 655 (C.A. 8); *Brown* v. *United States*, 250 F. 2d 745 (C.A. 5), certiorari denied, 356 U.S. 938.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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SEPTEMBER 1961.

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[2] This testimony does not appear in the partial trial transcript lodged in this Court. It is found in a typewritten supplement of the trial record lodged by the government below in the court of appeals.

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